No. _____ 061721 2007

In The

Supreme Court of the United States

MARAKAY J. ROGERS, ESQUIRE,
THE GREEN PARTY OF PENNSYLVANIA,
THE CONSTITUTION PARTY OF PENNSYLVANIA,
KEN V. KRAWCHUK, and HAGAN SMITH,

Petitioners,

v.

PEDRO A. CORTES, Secretary of
the Commonwealth Of Pennsylvania,

Respondent.

**On Petition For A Writ Of Certiorari To
The United States Court Of Appeals
For The Third Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does Pennsylvania Statute 25 P.S. 2911(b) violate the right of association and speech pursuant to the First Amendment and the equal protection clause pursuant to the Fourteenth Amendment of the United States Constitution since the statute required already qualified minor political parties in Pennsylvania to have their nominated statewide candidates gather signatures of at least two percent of the highest vote total for the last statewide election (67,070 signatures for 2006) to have their names placed on the November 2006 general election ballot, particularly when nominated candidates of major political parties do not have to do so resulting in no minor political party statewide candidates on the 2006 General Election ballot?

Does this signature requirement force nominated candidates of qualified minor political parties and qualified minor political parties to have to associate with others of different political viewpoints and different party registration to get on the general election ballot in violation of the First Amendment right of association? Was the decision of the Third Circuit in opposition to *California Democratic Party v. Jones*, 530 U.S. 567, 120 S. Ct. 2402 (2000)?

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OPINION BELOW

The Petition for Writ of Certiorari is sought from the Order of the United States Court of Appeals dated April 5, 2007 denying the Petition for Rehearing En Banc, which is attached as Appendix III, and the reported decision and the Order of the United States Court of Appeals for the Third Circuit of *Rogers v. Corbett*, 468 F.3d 188 (3rd Cir. 2006), which is attached as Appendix I.

JURISDICTION

This Honorable Court has jurisdiction to review the April 5, 2007 Order and the November 3, 2006 reported Opinion of the United States Court of Appeals for the Third Circuit (Appendix III and Appendix I) pursuant to 28 U.S.C.A. 1254(1), which allows for review by the United States Supreme Court of decisions by the Courts of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

First Amendment of the United States Constitution

> "Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." (First Amendment of the United States Constitution).

Fourteenth Amendment of the United States Constitution

"No state shall make or enforce any law which shall . . . Nor deny to any person within its jurisdiction the equal protection of the laws." (Fourteenth Amendment of the United States Constitution).

25 P.S. 2911(b)

"(b) Where the nomination is for any office to be filled by the electors of the State at large, the number of qualified electors of the State signing such nomination paper shall be at least equal to two per centum of the largest entire vote cast for any elected candidate in the State at large at the last preceding election at which State-wide candidates were voted for. In the case of all other nominations, the number of qualified electors of the electoral district signing such nomination papers shall be at least equal to two per centum of the largest entire vote cast for any officer, except a judge of a court of record, elected at the last preceding election in said electoral district for which said nomination papers are to be filed, and shall be not less than the number of signers required for nomination petitions for party candidates for the same office. In cases where a new electoral district shall have been created, the number of qualified electors signing such nomination papers, for candidates to be elected at the first election held after the creation of such district, shall be at least equal to two per centum of the largest vote cast in the several election districts, which are included in the district newly created, for any officer elected in the last preceding election." [25 P.S. 2911(b)].

STATEMENT OF FACTS

The Petitioners are two qualified minor political parties in Pennsylvania (the Green Party and the Constitution Party) and candidates seeking or receiving the nomination of their qualified minor political party. In this case, Marakay Rogers sought and received the nomination for Governor of Pennsylvania on the Green Party ticket. Hagan Smith was seeking the nomination for Governor from the Constitution Party. Ken Krawchuk was seeking the nomination for the United States Senate from the Libertarian Party. The candidates and the qualified minor political parties were all seeking to run statewide candidates during the general election in Pennsylvania, which was held on November 7, 2006. Because of the decision from which review is now being sought [*Rogers v. Corbett*, 468 F.3d 188 (3rd Cir. 2006)] not one qualified minor political party in Pennsylvania was able to have any of their nominated statewide candidates on the general election ballot for the November 2006 general election.

The Petitioners sought declaratory and injunctive relief pursuant to 42 U.S.C.A. 1983 seeking to declare Pennsylvania Statute 25 P.S. 2911(b) unconstitutional, in violation of their First Amendment right of association and Fourteenth Amendment right to equal protection. This Statute required the nominated candidates of qualified minor political parties to obtain signatures equaling 2% of the largest entire vote cast for any statewide office in the last preceding election. In the year 2006, the 2% requirement was 67,070 signatures for the nominated candidates of any minor qualified political party. None of the Petitioners or their candidates were able to obtain 67,070 good signatures, so the November 7, 2006 election ballot in

Pennsylvania did not contain the name of any statewide candidate for any of the qualified minor political parties.

An injunctive hearing was held on February 2, 2006 before the Honorable John E. Jones, III of the United States District Court for the Middle District of Pennsylvania. Judge Jones denied the injunctive declaratory relief on April 5, 2006. [*Rogers v. Cortes*, 426 F.Supp. 2d 232 (M.D. Pa. 2006)]. A timely appeal was filed to the United States Court of Appeals for the Third Circuit. The case was argued on July 10, 2006. The Third Circuit in a reported Opinion on November 3, 2006, affirmed the decision of Judge Jones. [*Rogers v. Corbett*, 468 F.3d 2006 (3rd Cir. 2006)]. A timely Petition for Rehearing En Banc was filed by the Petitioners. This request was denied by Order of the United States Court of Appeals for the Third Circuit dated April 5, 2007 (Appendix III). The Petition for Writ of Certiorari is from the aforementioned decisions.

The pertinent facts were presented in a Stipulation of Record and the evidence presented during the February 2, 2006 hearing before Judge Jones.

In Pennsylvania during the 2006 general election, there were at issue the statewide offices of Governor, Lieutenant Governor and United States Senator for the Commonwealth of Pennsylvania. The Petitioners as qualified minor political parties, nominated candidates for these statewide offices.

A summary of the pertinent evidence presented during the February 2, 2006 injunctive hearing and also as summarized in the Joint Stipulation of Facts is now necessary (A-7, A-91). Per the Stipulation, the requirement for signatures of candidates for qualified minor political parties to have their names placed on the ballot for the

general election to be held in November of 2006 in the Commonwealth of Pennsylvania is 67,070 signatures (A-7). This figure was based on two percent of the largest entire vote cast for an elected candidate in the Commonwealth of Pennsylvania in the last preceding statewide election. The last preceding statewide election in Pennsylvania involved the election of Robert Casey for State Treasurer. Mr. Casey received 3,353,489 votes in the 2004 general election. Two percent of Mr. Casey's vote total is 67,070 signatures (A-7, A-8).

Candidates for statewide office who have been nominated by a qualified minor political party are allowed to begin circulating their nominating papers to obtain the appropriate number of signatures on March 8, 2006 (25 P.S. 2913(b), A-8). The last day to complete the circulation process and signature gathering is August 1, 2006 (A-8). This date was based on a consent decree entered by the Pennsylvania Department of State in the case of *Hall v. Davis*, No. 84-1057 (E.D. Pa. 1986) and the case of *The Libertarian Party of Pennsylvania v. Davis*, No. 84-0262 (E.D. Pa. 1986) (A-8). Once the nominating petitions are filed, there is a seven day window to file challenges to the nominating petitions (25 P.S. 2937, A-8).

In Pennsylvania, the total number of registered voters as of January 30, 2006 was as follows:

(a.) Democratic Party – 3,833,206;
(b.) Republican Party – 3,287,810;
(c.) Libertarian Party – 34,100;
(d.) Green Party – 16,323;
(e.) Constitution Party – 3,008;

(f.) Other Registrants, who would include Independents and members of other political parties that were not qualified as minor political parties – 889,803. (A-8, A-9).

The parties further stipulated that the offices scheduled for election in the general election of 2006 in Pennsylvania are those of the United States Senator, Governor of Pennsylvania and Lieutenant Governor of Pennsylvania (A-9). There was a stipulation that a member of the major political parties, i.e., Democrat or Republican Party, who were seeking statewide office in the general election for 2006 would run in the primary election (A-9, A-10). The nominating petitions for candidates seeking to run in the Democratic or Republican Primary that was held on May 16, 2006 would require the following signatures:

(a.) United States Senator – 2000;

(b.) Governor of Pennsylvania – 2000 signatures, including 100 signatures from each of ten counties;

(c.) Lieutenant Governor of Pennsylvania – 1,000 signatures, including 100 signatures from each of at least five counties (A-9).

The parties further stipulated that the Respondent, Pedro Cortes, the Secretary of the Commonwealth of Pennsylvania, had the responsibility for supervising elections in the Commonwealth of Pennsylvania and is responsible for enforcing the Pennsylvania Election Law and for determining the facial sufficiency and legality of nominating petitions, nominating certificates and nominating papers that by law must be filed with the Secretary of the Commonwealth's Office (A-10, A-11). The Secretary of the Commonwealth is also responsible for overseeing statewide elections, including the elections for offices of

Governor, Lieutenant Governor and the Office for United States Senate (A-10, A-11).

There was a further stipulation that the Green Party, the Constitution Party and the Libertarian Party, were minor political parties that have qualified as minor political parties pursuant to Pennsylvania Statute 25 P.S. 2831(a) (A-10). The Green Party and The Constitution Party are Petitioners in this request for Certiorari. Pennsylvania Statute 25 P.S. 2831(a) reads in pertinent portions as follows:

> " . . . Any party or political party, one of whose candidates at the general elections next preceding the primary polled in each of at least ten counties of the state, not less than two percent of the largest entire vote cast in each of the said counties for any elected candidate and polled a total vote in the state equal to at least two percent of the largest entire vote cast in the state for any elected official." (25 P.S. 2831(a), A-10).

The Petitioner, The Green Party, qualified as a minor political party based on the approximately 70,000 vote total received by the Appellant, Marakay Rogers, when she ran for Attorney General of Pennsylvania on the Green Party ticket in the 2004 election and received approximately 2.1% of the vote (A-104, A-105). The Constitution Party qualified as a minor political party based on the election in 2004 when Jim Clymer, the current National Chairman of the Constitution Party, ran for United States Senate and received approximately 220,000 votes, which far exceeded the two percent requirement (A-161). The Libertarian Party qualified as a minor political party when its candidate in the 2004 election for the United

States Senate also received more than two percent of the total vote (A-124, A-125). Therefore, the Green Party, the Constitution Party and the Libertarian Party, all were qualified minor political parties having met the requirement of Pennsylvania Statute 25 P.S. 2831(a), and have demonstrated that each of these minor political parties have the necessary modicum of political support and strength to qualify as a minor political party under Pennsylvania law and have demonstrated sufficient support for that position to be accorded minor political party status (A-10).

The Petitioners, Marakay Rogers, The Green Party of Pennsylvania, The Constitution Party of Pennsylvania, Hagan Smith and Ken Krawchuk, are in a different position than independent candidates and non-qualified political parties in the 2006 elections since the qualified political parties, unlike independent candidates and non-qualified minor political parties, have already demonstrated the necessary support to be accorded minor political party status.

Each of the qualified minor political parties, including the Petitioners, has a procedure for nominating their candidates for statewide office. The Green Party's By-Laws under Section 6 of their By-Laws (Exhibit "P-11"), give the Green Party the exclusive authority to nominate Green Party Candidates for federal and state offices. No candidate can run on the Green Party ticket without the Green Party nomination per their By-Laws and procedures (Exhibit "P-11", A-9, A-10, A-106). Further, the Constitution Party's By-Laws under Article 9 gives exclusive authority to the Constitution Party to nominate their candidates for statewide office. Just like the Green Party, no candidate can run on the Constitution Party ticket

without the nomination of the party (Exhibit "P-13", A-151, A-152). The Libertarian Party's By-Laws allow only for the Libertarian Party to nominate statewide candidates for their party ticket to run for statewide office in the year 2006. No candidate can run on the Libertarian Party ticket without the Nomination of that party (A-125, A-126). The undisputed evidence presented, both by testimony and through the stipulations, was that the three qualified minor political parties in Pennsylvania, the two Petitioners, the Green Party and the Constitution Party and non-Petitioner, Libertarian Party, have sole authority to nominate who is their candidate for statewide office. Only candidates nominated by these respective parties could run on their party's ticket for the general election which was held in 2006 in Pennsylvania (Exhibits "P-11" and "P-13") (A-9, A-10, A-106, A-125, A-126, A-151, A-152).

The parties also stipulated that the two percent signature requirement of 25 P.S. 2911(b) needed for candidates of qualified political parties, vary substantially each year (A-8). Pursuant to the Joint Stipulation, the following signature requirements were necessary for the respective years:

(a.) 1987 – 38,131;
(b.) 1988 – 25,568;
(c.) 1989 – 58,035;
(d.) 1990 – 24,858;
(e.) 1991 – 41,305;
(f.) 1992 – 37,216;
(g.) 1993 – 56,641;
(h.) 1994 – 23,294;
(i.) 1995 – 34,714;
(j.) 1996 – 24,425;
(k.) 1997 – 47,356;
(l.) 1998 – 24,390;

(m.) 1999 – 36,284;
(n.) 2000 – 21,739;
(o.) 2001 – 53,032;
(p.) 2002 – 21,028;
(q.) 2003 – 38,265;
(r.) 2004 – 25,697;
(s.) 2005 and 2006 – 67,070 (A-19).

Obviously, the varying figures for each year create uncertainty for minor political parties in their need to qualify their nominated state candidates to be on the election ballot in the general election.

Further, the parties stipulated that Pennsylvania has a very tedious and stringent signature requirement, which would require the striking of a signature if any aspect of the signature requirement was not completed (A-111, A-112). For instance, Pennsylvania forbids the use of nicknames, the use of ditto marks and forbids the use of printed signatures (A-111, A-112). In Pennsylvania, a signer has to also fill out completely the address information and date. If someone signs a petition in Pennsylvania, but the circulator fills out the address and date, the signature will be stricken [A-111, A-112, see *In re Nomination of Flaherty,* 770 A.2d 327 (Pa. 2001) and *In re Nomination of Silcox*, 674 A.2d 224 (Pa. 1996)].

There was extensive testimony as to the difficulty in Pennsylvania of obtaining 67,070 signatures. The Petitioner, Marakay Rogers, testified the signature requirement made it difficult, if not impossible, to meet (A-109 – A-112). The Petitioner, Ken Krawchuk, also testified as to the difficulty in obtaining signatures, particularly in his earlier race where he only had to obtain 21,028 signatures (A-126 – A-128). Mr. Krawchuk also noted in the year 2004, the Independent Presidential Candidate, Ralph

Nader, collected 51,273 signatures, of which 32,455 were stricken, leaving only a total of 18,808 valid signatures resulting in Mr. Nader's name being removed from the election ballot [A-13, A-14, A-132 – A-134, *In re Nader*, 865 A.2d 8 (Pa. Comm. Ct. 2004)].

Paul Teese, the State Chairman of the Green Party, testified by stipulation that the signature requirement was so difficult and onerous that there was a debate within the Green Party where approximately one-third to one-half of the Green Party members were against filing statewide candidates in the year 2006 because of the huge and impossible signature requirement of 67,070 signatures (A-166, A-167).

The Petitioners, Marakay Rogers, The Green Party Candidate for Governor, Ken Krawchuk, who sought the Libertarian Party Candidate for United States Senate, Alan Kaiser, the Chairman of the Constitution Party of Pennsylvania, Hagan Smith, who sought the Governor Candidate for the Constitution Party, and James Clymer, the National Chairman of the Constitution Party, all testified that to get the 67,070 signatures, they would have to go to persons of opposite and differing viewpoints who are not members of their respective parties, but members of other political parties, to allow their nominated candidates to get on the general election ballot (A-114, A-127, A-128, A-159, A-165, A-166).

Of importance was the testimony of Alan Kaiser, the Chairman of the Constitution Party, that if his party was unable to run a statewide candidate, then his party risked being disqualified as a minor political party in the next statewide general election since there would be no one who would be running with the party label who would have a

chance of getting the two percent vote requirement to keep the party qualified (A-156). James Clymer noted this impossible signature requirement, mandating association with persons of other political viewpoints and indicated at least one potential candidate for governor on the Constitution Party ticket withdrew from consideration at the convention because of the impossible task of getting 67,070 signatures (A-165). Marakay Rogers, in fact, testified that to obtain 67,070 valid signatures, one would have to get at least 100,000 signatures because of the striking process to be sure 67,070 signatures that remained were valid (A-111, A-112).

The evidence was unrefuted that in order for a nominated candidate of a qualified minor political party to get on the ballot, one could not do so without being forced to seek the support of persons who they would not necessarily associate with or who they would not necessarily agree with or who were of different party registrations (A-114, A-115, A-127, A-128, A-156, A-165, A-166).

The Petitioner, Marakay Rogers, testified she was the former State Chair of the Green Party and it was her intention to run for Governor on the Green Party ticket in the election scheduled for November of 2006 (A-105). She testified she had been preliminarily endorsed by the Green Party and was submitting her name at the upcoming Green Party Convention (A-105 – A-107). The Petitioner, Ken Krawchuk, testified he was the past Chair of the Libertarian Party and he had announced his intention to seek the Libertarian Party's nomination for United States Senate in the upcoming election which is scheduled for November of 2006 and was submitting his name (A-123 – A-125). The Petitioner, Hagan Smith, stated it was his intention to run for the Office of Governor on the Constitution

Party ticket in the upcoming election and he was submitting his name at the Convention scheduled for the end of February of 2006 (A-157). The State Chairman of the Constitution Party of Pennsylvania, Alan Kaiser, testified during the proceedings as did the National Chair, James Clymer (A-149, A-160). In addition to the testimony of Marakay Rogers, testimony was also presented by Paul Teese, the then-current Chair of the Green Party (A-103, A-166).

The Respondent presented Jonathan Marks, the Chief of the Divisions of Elections and Precinct Data for the Pennsylvania Bureau of Elections (A-170). He testified as to the review of a nominating petition and the reasons his department might strike a nominating petition (A-171). He stated a street list for each county would be provided to a candidate (A-173). He stated the circulator for a minor political party did not have to be a registered voter (A-173). On cross-examination, he testified to the signature striking process (A-174 – A-178).

There was no evidence during the February 2, 2006 hearing presented by the Respondent as to any concern or problem of ballot clutter.

The evidence clearly demonstrated that candidates nominated by the minor qualified political parties could not be on the election ballot for their respective parties despite their nominations by those parties unless they each obtain 67,070 signatures from persons of different parties and different viewpoints and different beliefs.

The practical effect of the onerous signature requirement of 25 P.S. 2911(b) resulted in not one statewide nominated candidate of any minor qualified political party appearing on the November 2006 general ballot in violation

of the First Amendment right of association and the Fourteenth Amendment equal protection clause. Further, this precluded the Petitioners, minor political parties, from being able to qualify as qualified minor political parties for the 2007 elections.

REASON FOR GRANTING THE PETITION

Pennsylvania Statute 25 P.S. 2911(b) violated the First Amendment right of association through the Fourteenth Amendment and the equal protection clause by requiring already nominated statewide candidates of qualified minor political parties to have to associate with others of different political viewpoints and different political registration to have their names on the general election ballot since the 2% signature requirement resulted in the need for 67,070 signatures to appear on the general election ballot. This decision appears to be in opposition to *California Democratic Party v. Jones*, 530 U.S. 567, 120 S. Ct. 2402 (2000).

The Petitioners were all qualified minor political parties in Pennsylvania or candidates for qualified minor political parties. Minor political parties who were qualified in Pennsylvania already had established that they had the necessary modicum of support as required by 25 P.S. 2831(a). This statute gave qualified minor political party status to minor political parties when their statewide candidate in the preceding election received at least two percent of the vote cast.

Each of the Petitioners, a qualified minor political party, had a process by which they nominated their statewide

candidate at their state conventions. There were bylaws and a nomination procedure where statewide candidates were endorsed by their respective qualified minor political party in Pennsylvania (A-106, A-125, A-126, A-151, A-152).

Of importance in evaluating this serious constitutional issue is the distinction between the Petitioners and independent candidates or unqualified political bodies, which have not demonstrated a modicum of political support. The Petitioners are in a very difficult position since they already had demonstrated a modicum of support pursuant to 25 P.S. 2831. This is an important distinction since the Respondent's concern that a candidate or party have demonstrated a modicum of support so there will not be cluttered election ballots, has already been established by the Petitioners. This fact was not properly credited by the United States Court of Appeals for the Third Circuit in the Opinion from which review is sought.

The United States Supreme Court, in *Storer v. Brown*, 415 U.S. 724, 94 S. Ct. 1274 (1974), in a case where a statute was upheld that required a candidate affiliated with a party to wait one year before running as an independent noted the difference between independent candidates and qualified minor political parties. *Id.* 1285, 1286. The Court noted, "But the political party and the independent candidate approaches to political activity are entirely different and neither is a satisfactory substitute for the other." *Id.* 1286.

The asserted injury, i.e. difficulty in obtaining ballot position by the Petitioners, must be balanced against legitimate state needs, including the right to insure a ballot is not overly cluttered and the election will be run in an orderly fashion.

> "The Court recognized the substantial state interest in encouraging compromise and political stability, in attempting to ensure that the election winner will represent a majority of the community and in providing the electorate with an understandable ballot and inferred that reasonable requirements for ballot position . . . would be acceptable. But these important interests were deemed insufficient to warrant burdens so severe as to confer an effective political monopoly on the two major parties. The First and Fourteenth Amendments, including the Equal Protection Clause of the latter, require as much." *Id.* 1278.

Ballot access laws implicate two different kinds of rights protected by the First and Fourteenth Amendments. First, there is the right of individuals to associate for the advancement of political beliefs and speech, and second, there is the right of qualified voters to cast their votes effectively. *Anderson v. Celebrezze*, 460 U.S. 780, 787, 103 S. Ct. 1564 (1983). Since *Anderson*, another right has been established through *California Democratic Party v. Jones*, 530 U.S. 567, 120 S. Ct. 2402 (2000). That case essentially held the First Amendment would be violated if a political party's basic function of nominating would be opened up to persons wholly unaffiliated with the party who may have a different view from the party.

In *Anderson v. Celebrezze*, 460 U.S. 780, 103 S. Ct. 1564 (1983), the following test to determine the constitutionality of a statute restricting a candidate's access to the ballot was developed as follows:

> " . . . A court must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth

> Amendments that the plaintiff seeks to vindicate. It must then identify and evaluate the precise interest put forward by the state in justification for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of these interests, it must also consider the extent to which those interests make it necessary to burden plaintiff's rights. Only after weighing all of these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional." *Id.* 790.

The degree of burden the Statute imposes on a constitutional right determines the level of scrutiny, which the court should apply. Where the state regulation creates a severe burden, the Court should apply strict scrutiny and the law is unconstitutional unless it is narrowly drawn to advance a compelling state interest. [*Burdick v. Takushi*, 504 U.S. 428, 434 (1992)]. Where the burden is less, a court applies a lesser level of scrutiny in direct proportion to the diminished burden. *The Patriot Party of Pennsylvania v. Mitchell*, 826 F.Supp. 926 (E.D. Pa. 1993)

In utilizing the above constitutional standard, obviously a state has an interest in requiring a sufficient showing of support. But the argument here is that the qualified minor political parties have already demonstrated sufficient support and should not have to be burdened with the additional signature petitioning requirement of two percent of the highest vote total which this year totals 67,070 signatures.

There is also an equal protection argument through the Fourteenth Amendment. State statutes that restrict a minor political candidate's ability to secure a place on the

ballot but don't impose the same restrictions on major parties without justification can violate a candidate's as well as a voter's and party's right under the equal protection clause. *Williams v. Rhodes*, 393 U.S. 23, 31-33, 89 S. Ct. 5 (1968)

Having stated the general test for constitutional review, Pennsylvania Statute 25 P.S. 2911(b) has to be put in context of other state procedures for nomination. From a review of various statutes in the United States, there are four procedures by which new political parties may qualify for the election ballot. Most states provide for a petition to qualify the group as a party. The petition is not a nominating petition. The petition qualifies the group as a political party only. The petitions are often worded "Petition to Qualify the _____ Party". States with this type of procedure are as follows: Alabama, Arizona, Arkansas, California, Colorado, Georgia, Hawaii, Idaho, Kansas, Maine, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Wisconsin and Wyoming.

A second method by which states provide for a group to get on the ballot is by measuring how many registered members the potential party has. The advantage of this method for election officials is that they need not do the work of checking the validity of signatures on petitions. The disadvantage is that election officials must do the work of tallying how many voters register as a member of the unqualified party. States that use this method for parties to qualify are Alaska, California, Colorado, Delaware, Louisiana and Massachusetts. Of these states, California and Colorado apparently provide the first

method of petition also and allow the group to decide which method the potential political party will use.

A third method by which states provide for a party to get qualified on the ballot is by requiring that it simply be organized. Nothing is needed by the group but to submit a list of party officers and a copy of the party's by-laws. States that provide this method are Florida, Mississippi and Vermont.

The fourth and final method is a nominating petition that names candidates and also displays the party's name. States in which this method is the only method for a new party, or a previously unqualified party, to get on the ballot are Connecticut, Illinois, Indiana, Iowa, Kentucky, New Jersey, New York, Pennsylvania, Virginia, Washington and West Virginia. These states are referred to as nominating petition states.

Pennsylvania is only one of two states that requires a qualified party candidate to submit their Petition for Nomination to be signed by the voters to allow the nominated candidate to be on the election ballot. New Mexico is the other state. Maryland did, but the procedure was found to be in violation of the state's equal protection clause in *Maryland Green Party v. Maryland Board of Elections*, 832 A.2d 214 (Md. Ct. of Appeals 2003).

The case of *Jenness v. Fortson*, 403 U.S. 431, 91 S. Ct. 1970 (1971) has to be considered. In that case, the United States Supreme Court upheld a Georgia election statute under which the nominee of any political organization other than any organization whose candidate received 20% or more of the votes at the recent statewide elections had to get nominating petitions signed by 5% of the eligible voters within a 180 day deadline. This was challenged

under both the First Amendment and equal protection arguments. The United States Supreme Court affirmed this particular statute and denied the constitutional challenge.

In looking at the aforementioned *Jenness* case, it first must be noted that the Georgia law did not apply to qualified political parties. The candidate in *Jenness* was not a member of a qualified political party in the state of Georgia. The Court noted as follows:

> "So far as the Georgia election laws are concerned, independent candidates and members of small or newly formed political organizations are wholly free to associate or proselytize, to speak, to write and to organize campaigns for any school of thought they wish. They may confine themselves to an appeal for write in votes or they may seek over six month periods the signatures of five percent of the eligible electorate for the office in question." *Id.* 1973

Obviously, there is a major distinction in the present case where the Petitioners are qualified political parties and their nominees are not independent candidates or newly-formed non-qualified political parties. Second, the law has changed since the aforementioned *Jenness* case. For instance, in *Jenness*, on page 1975, the United States Supreme Court noted that a candidate has an alternative route by entering the primary of a political party or circulating nominating petitions as an independent candidate under the sponsorship of a political organization. This is expounded in footnote 25. *Id.* 1975. This footnote is not the law any longer as set forth in the case of *California Democratic Party v. Jones*, 530 U.S. 567, 120 S. Ct. 2482 (2000). In that case, the constitutionality of California's

primary elections which were converted from closed to open primaries where voters could vote for any candidate regardless of the voters' or candidates' party affiliation, was found to violate a political party's First Amendment right of association by opening up the process to persons wholly unaffiliated with the party and who have differing viewpoints. The United States Supreme Court noted that although states play a major role in monitoring primary elections, the processes by which political parties select their nominees are not wholly public affairs that states may regulate freely, but instead states must act within constitutional limits when regulating party's internal processes. Clearly, the language in the aforementioned *Jenness* case would not be acceptable in view of the *California Democratic Party* case since it would force a candidate to go to persons with different viewpoints and be forced to associate with them to get on the ballot.

Further, the facts in *Jenness* are very different. *Jenness* had been filed in 1970 by Socialist Workers Party and its candidates for Governor and the House of Representatives. Linda Jenness was a candidate for Governor and needed 88,175 valid signatures. The Socialist Workers Party was not a qualified party and described itself as a small party with ideas not accepted by most voters. A review of the election history indicates that Georgia's 20% vote definition of a political party was extremely high. In Georgia, no party other than the Republican and Democratic Parties had met the 20% requirement other than the Bull Moose Progressive Party in 1912. Georgia never had a history as a result of cluttered ballots. The United States Supreme Court totally ignored these facts in deciding *Jenness*. The present case, unlike *Jenness*, involved candidates for already qualified political parties and there

was no evidence presented of concern for ballot confusion in Pennsylvania.

Certainly Pennsylvania, in statewide elections, has not had crowded ballots over the years. There was no evidence presented at the hearing to suggest that the Commonwealth had any fear of ballot clutter if 25 P.S. 2911(b) was struck down. In fact, as noted in the case of *In re Nader*, 865 A.2d 8 (Pa. Cmwlth. Ct. 2004), even the signature requirement of 25,680 signatures was not met by an independent presidential candidate, thereby resulting in Mr. Nader's name being struck from the ballot.

In the aforementioned *California Democratic Party v. Jones*, 530 U.S. 576, 120 S. Ct. 2402 (2000) decision, the United States Supreme Court noted the following:

> "In no area is the political association's right to exclude more important than in the process of selecting its nominee. That process often determines the party's position on the most significant public policy issues of the day . . . " *Id.* 2408.

The United States Supreme Court in the aforementioned *California Democratic Party v. Jones* noted as follows:

> "Unsurprisingly, our cases vigorously affirm the special place the First Amendment reserves for and the special protection it accords, the process by which a political party selects a standard bearer who best represents the party's ideologies and preferences . . . " *Id.* 2408.

The United States Supreme Court found that the California law which forced political parties to associate with and to have their nominees determined by persons who refuse to affiliate with their party to be in violation of the First

Amendment. The United States Supreme Court noted as follows:

> "Respondents' legitimate state interest and petitioners' First Amendment rights are not inherently incompatible. To the extent they are in this case, the State of California has made them so by forcing political parties to associate with those who do not share their beliefs. And it has done this at the crucial juncture at which political members traditionally find their collective voice and select their spokesman . . . the burden . . . places on Petitioners' right of association is both severe and unnecessary." *Id.* 2414.

In the present case, the core function of each of the qualified political parties in Pennsylvania is to nominate their statewide candidates. Each party, the Constitution Party, the Green Party, and the Libertarian Party, has a procedure for their nomination process as set forth in their by-laws.

Since Pennsylvania has a procedure for qualifying political parties that demonstrate the modicum of support to gain the political party status to get on the ballot [25 P.S. 2831(a)], each of these qualified parties has a right to make their own nomination without interference from strangers and persons of differing political viewpoints and party membership. This two step process in Pennsylvania, i.e. qualifying the political party and then making the political party's nominee obtain signatures from other persons is unconstitutional and is in violation of the First Amendment of the United States Constitution, since it forces the parties to associate with others, and is in violation of the equal protection clause since it discriminates against minor political parties as opposed to the

major political parties whose nominated candidates then do not have to get signatures from persons of other viewpoints to get on the election ballot.

Another case of significance is *Clingman v. Beaver*, 544 U.S. 581, 125 S. Ct. 2029 (2005). That case involved Oklahoma's semi-closed primary system under which a political party could invite only its own registered members and voters registered as independents to vote in the primary. The Libertarian Party wanted to open its primary to all voters. The Court found that a semi-closed primary system did not violate the First Amendment freedom of association. In *Clingman*, the Supreme Court noted that the State of Oklahoma had an interest in preventing party raiding. In the present case, the exact opposite is occurring with the Petitioners. Other persons can determine who will be the nominee of the qualified political parties by the signature requirement in 25 P.S. 2911(b). The signature petition utilized in Pennsylvania actually contains language the signers are nominating the candidate.

The Petitioners contend the United States Court of Appeals in *Rogers v. Corbett*, 468 F.3d 188 (3rd Cir. 2006) further erred in stating the Commonwealth had a valid concern in "ensuring viable candidates." *Id.* 197. The Petitioners contend that viability has never been the determining factor whether a candidate should be on the ballot.

There has to be some showing of support. But, the fact that a candidate may not win has not been the criteria. Instead the Courts have recognized in the past that minor political party candidates interject new ideas and concepts into the political process that benefit the electoral and voting process. The United States Supreme Court has

recognized that the purpose of minor political parties in history has been to introduce these new ideas into the political and governmental system and the role of a minor political party is not necessarily just to win elections.

> "Competition and ideas in government policies is at the core of our electoral process under the First Amendment freedoms." [*Anderson v. Celebrezze*, 460 U.S. 780, 103 S. Ct. 1564, 1577 (1983)].

In the case of *Sweezy v. State of New Hampshire by Wyman*, 354 U.S. 234, 77 S. Ct. 1203 (1957), in a case that was not in the context of a ballot access but involved questions about the Communist Party, the United States Supreme Court talked about the power of ideas from a minor political party.

> "All political ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved the virtue of political activity by minority, dissonant groups who innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted." *Id.* 1212.

In *Norman v. Reed*, 502 U.S. 279, 112 S. Ct. 698 (1992), the United States Supreme Court talked about again the need of new political parties for the purpose of creating new ideas.

> "For more than two decades, this Court has recognized the constitutional right of citizens to create and develop new political parties. The right derives from the First and Fourteenth Amendments and advances the constitutional interest of all like minded voters to gather in pursuit of common political ends, thus enlarging the opportunities of all voters to express their own

> political preferences . . . to the degree that a state would thwart this interest by limiting the access of new parties to the ballot, we have called for the demonstration of a corresponding interest sufficiently weighty to justify the limitation . . . and we have accordingly required any severe restriction to be narrowly drawn to advance a state interest of compelling importance." *Id.* 705.

The concern expressed by the Third Circuit of ballot clutter ignored the evidence in Pennsylvania. The history in Pennsylvania has no examples of ballot clutter in the statewide elections. In fact, if the three qualified political parties had their candidates placed on the ballot, there would be no ballot clutter since there would be five candidates, including the Republican and Democratic Parties for statewide elections as opposed to two. The United States Supreme Court has defined ballot clutter as being far more than five potential candidates.

In *Lubin v. Panish*, 415 U.S. 709, 94 S. Ct. 1315 (1974), the United States Supreme Court talked about 12 or more candidates in terms of a cluttered ballot. *Id.* 1320.

Clearly, having five candidates on the ballot in Pennsylvania is far short of the 12 that the United States Supreme Court expresses its concern in *Lubin*. In *Williams v. Rhodes*, 393 U.S. 23, 89 S. Ct. 5 (1968), in the concurring Opinion of Justice Harlan, he noted that 8 candidates on the ballot would not carry a significant danger of voter confusion. *Id.* 19.

There have been four recent cases that are worth considering. In the case of *Green Party of Arkansas v. Daniels*, 448 F.Supp. 2d 1056 (E.D. Ark. 2006), the United States District Court of Arkansas struck down a ballot

access petition requirement of 3% of the last gubernatorial vote, even though that amounted to only 1.4% of the number of registered voters. In *Lee v. Keith*, 463 F.3d 763 (7th Cir. 2006), the Seventh Circuit struck down the deadline for independent candidates, even though that deadline had previously been upheld by a 1986 decision of the Seventh Circuit. In *Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579 (6th Cir. 2006), the Sixth Circuit struck down the petition requirement for new parties of 1% of the last vote cast, combined with an early petition deadline. In *Torres v. New York State Board of Elections*, 462 F.3d 161 (2nd Cir. 2006), the Second Circuit Court of Appeals struck down the petition requirement for candidates for the delegate to judicial nominating conventions to get on the ballot and major party primaries even though for Democrats, the average such petition amounted to only 1.37% of the number of registered voters. All four of these decisions were very fact intensive and the facts showed that the challenged laws were not needed to prevent ballot clutter.

This decision stands in contrast to the Third Circuit's concern for ballot clutter.

This Petition for Writ of Certiorari should be granted since the decision of the Third Circuit unfairly violates the First Amendment and the equal protection clauses of the United States Constitution and appears to be in opposition to *California Democratic Party v. Jones*, 530 U.S. 567, 120 S. Ct. 2402 (2000). The practical effect of this decision is to end minor political party involvement in statewide elections in Pennsylvania.

CONCLUSION

The Petitioners, by their counsel, Samuel C. Stretton, Esquire, respectfully request this Honorable Court grant the Petition for a Writ of Certiorari and reverse the decision of the Third Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX I

468 F.3d 188

United States Court of Appeals,Third Circuit.
Marakay J. ROGERS, Esquire, Candidate for Governor of Pennsylvania; the Green Party of Pennsylvania, c/o Paul Teese, Chair; the Constitution Party of Pennsylvania; Ken V. Krawchuk; Hagan Smith,
Appellants.
v.
Thomas W. CORBETT, Jr., Attorney General of Pennsylvania; Commonwealth of Pennsylvania, c/o Office of the Attorney General of Pennsylvania; Governor Edward G. Rendell; Pedro A. Cortes, Secretary of Commonwealth of Pennsylvania.
No. 06-2241.

Argued on July 10, 2006.
Opinion Filed Aug. 23, 2006.
Panel Rehearing Granted Nov. 3, 2006.
Opinion Filed Nov. 3, 2006.

Samuel C. Stretton, Esquire (Argued), West Chester, PA, for Appellants.

Thomas W. Corbett, Jr., Esquire, Attorney General, Howard G. Hopkirk, Esquire (Argued), Senior Deputy Attorney General, John G. Knorr, III, Esquire, Chief Deputy Attorney General, Chief, Appellate Litigation Section, Office of the Attorney General of Pennsylvania, Harrisburg, PA, for for Appellees.

Before SMITH, ALDISERT, and ROTH, Circuit Judges.

OPINION

ROTH, Circuit Judge.

Plaintiffs, a group of minor political parties and minor party nominees for state-wide office,[1] challenged the constitutionality of Section 2911 of the Pennsylvania election code, 25 Pa. Stat. § 2911(b), as applied to minor political parties and their candidates. They moved for a preliminary injunction against Pedro A. Cortes, Secretary of the Commonwealth of Pennsylvania. The District Court denied the motion and plaintiffs appealed. For the reasons stated below, we will affirm the judgment of the District Court.

I. Background

Under Pennsylvania law, a political body is qualified as a political party when one of its candidates obtains a 2% level of support in the preceding general election. Specifically, 25 Pa. Stat. § 2831(a) defines a political party as:

> Any party or political body, one of whose candidates at the general election next preceding the primary polled in each of at least ten counties of the State not less than two per centum of the largest entire vote cast in each of said counties for any elected candidate, and polled a total vote in the State equal to at least two per centum of

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[1] Plaintiffs are Marakay Rogers, Esq., the Green Party candidate for Governor in the November 2006 general election; the Green Party of Pennsylvania; Hagan Smith, the Constitution Party candidate for Governor; the Constitution Party of Pennsylvania; and Ken V. Krawchuk, the Libertarian Party candidate for the United States Senate.

> the largest entire vote cast in the State for any elected candidate, is hereby declared to be a political party within the State.

Pennsylvania law further distinguishes between political parties (a/k/a/ major political parties) and minor political parties. Minor political parties are political parties with registered membership of less than 15% of the state-wide registration for all political parties.[2]

Political parties, *i.e.*, at present the Republican and Democrat parties, place their candidates on the general election ballot via a primary system. 25 Pa. Stat. § 2862. To appear on the ballot for the primary election, the Republican and Democrat candidates must get a prescribed number of signatures from individuals who are members of their respective parties. For example, a candidate for Governor must obtain 2,000 signatures. The winner of a plurality of votes in the primary is placed on the general election ballot as the candidate of his or her respective party.

Minor political parties, as well as political bodies not recognized as parties, place their candidates, and independent candidates place their names, on the general election ballot by nomination petitions. 25 Pa. Stat. §§ 2872.2, 2911. To be placed on the general election ballot by a nomination petition, the candidate must obtain the signatures of a prescribed number of registered voters

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[2] A minor political party is defined in 25 Pa.Stat. § 2872.2 as a:

> political party . . . whose State-wide registration is less than fifteen per centum of the combined State-wide registration for all State-wide political parties as of the close of the registration period immediately preceding the most recent November election.

(regardless of party). The number of signatures must be equal to 2% of the vote total of the candidate who obtained the highest number of votes for state-wide office in the previous election.[3]

Candidates have approximately five months to circulate nomination petitions. For the November 2006 general election, petitions can be circulated from March 8, 2006, until August 1, 2006. A signatory must be a qualified elector of Pennsylvania who has registered to vote either on or before the day he signs the nomination petition. A signatory need not be a member of a political party. A signatory may sign a minor party candidate's nomination petition even if he has signed a nomination petition in support of a Republican or Democrat or voted in a major party primary, but a signatory may sign a nomination petition in support of only one candidate for each office for which there is a vacancy.

Unfortunately for minor political parties, political bodies and independent candidates, Bob Casey, Jr., soundly defeated his challenger for State Treasurer in 2004 in the biggest voter turnout in Pennsylvania history. Consequently, the "largest entire vote cast for any elected candidate in the State at large" is larger this cycle than in previous election years, based on Casey's high total. As

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[3] 25 Pa. Stat. § 2911(b) provides that:

> Where the nomination is for any office to be filled by the electors of the State at large, the number of qualified electors of the State signing such nomination paper shall be at least equal to two per centum of the largest entire vote cast for any elected candidate in the State at large at the last preceding election at which State-wide candidates were voted for.

such, 2% of that total, the number of required signatures, is 67,070, compared to previous years in which the number generally ranged between 30,000 and 50,000.[4]

Plaintiffs are challenging the constitutionality, as applied to minor political parties, of the 2% variable threshold requirement of § 2911(b) for a candidate to be placed on the general election ballot. The feature which distinguishes plaintiffs' argument from previous attacks on § 2911(b) is that plaintiffs are challenging the combination of § 2831(a)'s 2% precondition to qualify as a political party and § 2911(b)'s 2% signature requirement that a minor political party must obtain in order for its candidates to be placed on the general election ballot. Plaintiffs contend that, having shown the 2% voter support in the previous election, they have shown their necessary "modicum" of support and should not have to petition to place candidates on the ballot.

Plaintiffs brought an action for declaratory and injunctive relief pursuant to 42 U.S.C. § 1983 on the grounds that § 2911(b) violates both the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution and the minor political parties' right of freedom of association under the First Amendment. For relief, plaintiffs have asked the District Court to enter an order allowing their parties' nominees to be placed on the general election ballot if they obtain the same number of signatures that candidates for the Republican and Democrat parties need to be placed on the primary ballot. Alternatively, plaintiffs have proposed other schemes to allow minor political party candidates to be placed on the general

[4] The previous high number was 58,035 in 1989.

election ballot after demonstrating a lesser level of support. Plaintiffs also urge that minor political parties ought not to be subject to any signature requirement in light of the fact that they have already qualified as a political party.

The parties jointly stipulated to the applicable facts. On April 5, 2006, the District Court denied the plaintiffs' motion for a preliminary injunction on the ground that § 2911(b) was constitutional. At the same time, the District Court strongly urged the Pennsylvania General Assembly to reconsider the 2% threshold in light of the 67,070 signatures needed this cycle. This timely and expedited appeal followed.

II. Jurisdiction and Standard of Review

The District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343. We have jurisdiction under 28 U.S.C. § 1292(a)(1) (noting that "the courts of appeals shall have jurisdiction of appeals from: (1) Interlocutory orders of the district courts of the United States ... granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions.").

Ordinarily, we use a three-part standard to review a District Court's decision to grant or deny a preliminary injunction. *Child Evangelism Fellowship of New Jersey, Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 524 (3d Cir.2004). The District Court's findings of fact are reviewed for clear error, the District Court's conclusions of law are evaluated under a plenary standard, and the

ultimate decision to grant the preliminary injunction is reviewed for abuse of discretion.[5] *Id.*

"The test for preliminary relief is a familiar one. A party seeking a preliminary injunction must show that (1) it has a likelihood of success on the merits, (2) it will suffer irreparable harm if the injunction is denied, (3) granting preliminary relief will not result in even greater harm to the nonmoving party, and (4) the public interest favors such relief." *Id.* (quoting *Kos Pharms., Inc. v. Andrx Corp.*, 369 F.3d 700 (3d Cir.2004)). Generally, a panel entertaining a preliminary injunction appeal decides only whether the district court abused its discretion in ruling on the request for relief and does not go into the merits any further than necessary to determine whether the moving party established a likelihood of success. *Id.* Here, however, we are not required to take this narrow approach because the appeal from the denial of the preliminary injunction presents a question of law; the facts are either established or of no controlling relevance. *Id.* In such a case, we may decide the merits of the claim. *Id.*

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[5] When First Amendment rights are at issue this standard is modified. Although we normally will not disturb the factual findings supporting the disposition of a preliminary injunction motion in the absence of clear error, we have a constitutional duty to conduct an independent examination of the record as a whole when a case presents a First Amendment claim. *Child Evangelism Fellowship*, 386 F.3d at 524. Here, however, the District Court's factual findings are not in dispute, although the parties do dispute their practical import.

III. Discussion

A. The District Court's Decision

In denying plaintiffs' request for a preliminary injunction, the District Court found that § 2911(b) did not impose a severe burden upon the plaintiffs' constitutional rights. Consequently, the court applied the familiar rational basis test to the statute to determine its constitutionality. As to the burden to minor political parties, the District Court noted that the 2% threshold of actual votes cast for a candidate was lower than the 5% threshold of eligible voters upheld after rational basis review by the Supreme Court in *Jenness v. Fortson,* 403 U.S. 431, 91 S.Ct. 1970, 29 L.Ed.2d 554 (1971). Also, the District Court observed that minor political parties may obtain the needed signatures from the entire population of registered voters in Pennsylvania regardless of the voters' party affiliation and that, otherwise, the nomination papers process is not overly burdensome. *See generally Storer v. Brown,* 415 U.S. 724, 738-40, 94 S.Ct. 1274, 39 L.Ed.2d 714 (remanding to the District Court to determine the burden on meeting the signature requirement while laying out a list of relevant factors for the District Court's consideration). Next, the District Court found that Pennsylvania's interests in decreasing ballot clutter and ensuring that only viable candidates are placed on the general election ballot justified the 2% threshold found in § 2911(b) and the corresponding burdens on minor political parties' rights.

In addition, the District Court dismissed the plaintiffs' equal protection claim that the plaintiffs had based on the difference in treatment between minor political parties and "major," *i.e.,* Republican and Democrat, political parties. The District Court noted that, in *Jenness,* the Supreme Court held that there are legitimate reasons for

states to treat minor and major party candidates differently. 403 U.S. at 441-42, 91 S.Ct. 1970. Furthermore, the District Court opined that Pennsylvania law actually treats major party candidates more harshly than their minor party colleagues by requiring major party candidates to poll a plurality of their party's votes to be placed on the general election ballot, which in all likelihood is a higher absolute number than the 2% signature requirement for minor party candidates. For these reasons, the District Court denied the plaintiffs' motion for a preliminary injunction.

B. *Anderson* and the Levels of Scrutiny

At oral argument before us, the parties were questioned about the applicable level of scrutiny and whether *Anderson v. Celebrezze,* 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983), annuls, or otherwise changes, the familiar strict scrutiny, intermediate scrutiny, and rational basis classifications as applied to ballot access cases. First, we note that this Court, as well as others, has been unclear whether the *Anderson* balancing test applies to ballot access claims brought under the Equal Protection Clause, given that *Anderson* is a First Amendment case. *See Belitskus v. Pizzingrilli,* 343 F.3d 632, 643 n. 8 (3d Cir.2003). We clarify here that the *Anderson* test is the proper method for analyzing such equal protection claims due to their relationship to the associational rights found in the First Amendment. In *Belitskus,* we observed that we could not "see any basis for refusing to so apply (*Anderson*)." *Id.; see also Reform Party of Allegheny Co. v. Allegheny Co. Dep't. of Elections,* 174 F.3d 305, 314 (3d Cir.1999) (assuming that "burdens require the same level of scrutiny in an equal protection analysis that they do in

an associational rights analysis."). Likewise, our sister Circuits have applied *Anderson* to similar claims under the Equal Protection Clause. *See, e.g., Fulani v. Krivanek,* 973 F.2d 1539, 1542-44 (11th Cir.1992); *Republican Party of Arkansas v. Faulkner Co.,* 49 F.3d 1289, 1293 n. 2 (8th Cir.1995) ("In election cases, equal protection challenges essentially constitute a branch of the associational rights tree."). As such, we conclude that *Anderson* sets out the proper method for balancing both associational and equal protection concerns and the burdens that the challenged law creates on these protections as weighed against the proffered state interests.

What then is the import of *Anderson* on the traditional three tiers of scrutiny? Although we appreciate that the strict scrutiny, intermediate scrutiny, and rational basis categories represent a convenient and familiar linguistic device by which courts, including our Court,[6] have characterized their review under *Anderson,* we note that *Anderson* promulgated a less categorical system of classification. *See Burdick v. Takushi,* 504 U.S. 428, 434, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992) (noting that the full Court agreed in *Anderson* that "a more flexible standard applies."). Put another way, ballot access cases should not be pegged into the three aforementioned categories. Rather, following *Anderson,* our scrutiny is a weighing process: We consider what burden is placed on the rights which plaintiffs seek to assert and then we balance that burden against the precise interests identified by the state and the extent to which these interests require that plaintiffs' rights be burdened. Only after weighing these

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[6] *See, e.g., Reform Party of Allegheny Co.,* 174 F.3d at 314 (applying an intermediate level of scrutiny).

factors can we decide whether the challenged statute is unconstitutional. *Anderson,* 460 U.S. at 789, 103 S.Ct. 1564. Consequently, we will look at the nature of the rights involved here and the burdens imposed by Pennsylvania election law on minor political parties in order to determine if the burden is justified.

C. Equal Protection

Ballot access is recognized as an important aspect of voting rights. See *Bullock v. Carter,* 405 U.S. 134, 143, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972) ("laws that affect candidates always have at least some theoretical, correlative effect on voters"). Nevertheless, using the pre-*Anderson* standard, "not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review." *Id.* (citing *McDonald v. Board of Election,* 394 U.S. 802, 89 S.Ct. 1404, 22 L.Ed.2d 739 (1969)). We interpret this standard to mean post-*Anderson* that the right to ballot access, although important in both First Amendment and Equal Protection contexts, may be limited in accord with appropriate state interests, and that limitations imposed in furtherance of such interests need not be the most narrowly drawn as long as they are nondiscriminatory and reasonable in light of the relevant burdens. *See Anderson,* 460 U.S. at 788, 103 S.Ct. 1564 ("[T]he state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions.").

The state interests here are avoiding ballot clutter and ensuring viable candidates. These interests have long been recognized as valid ones. *See Jenness,* 403 U.S. at 442, 91 S.Ct. 1970. The burden is the 2% signature requirement. This burden is not unreasonable. In light of the

more obtrusive law upheld in *Jenness,* "it is beyond dispute that Pennsylvania's 2% (signature) requirement (for ballot access) is facially valid." *The Patriot Party of Pa. v. Mitchell,* 826 F.Supp. 926, 939 (E.D.Pa.1993); *Perry v. Grant,* 775 F.Supp. 821, 826 (M.D.Pa.1991) ("Two percent is not an inherently unreasonable or unduly burdensome signature requirement."). Indeed, plaintiffs do not seriously contest the facial validity of the state's proffered legitimate interest-reducing ballot clutter and ensuring viable candidates. *See generally Munro v. Socialist Workers Party,* 479 U.S. 189, 195, 107 S.Ct. 533, 93 L.Ed.2d 499 (1986) (noting that states do not have to prove actual ballot overcrowding). Furthermore, in *Storer* the Supreme Court noted that "gathering 325,000 signatures in 24 days would not appear to be an impossible burden." 415 U.S. at 740, 94 S.Ct. 1274. Here, the burden on minor parties is significantly less, both in terms of the number of signatures and the time allowed to obtain them. Also, the fluctuations in the total do not present constitutional issues. *Perry,* 775 F.Supp. at 827-28 ("the fact that the total number of signatures required fluctuates with election results does not render it unconstitutional.").

Given that courts have held that signature requirements at a percentage rate even greater than the number involved here are reasonable, and in view of the acknowledged state's interest in imposing this burden, we conclude that § 2911(b) is not unconstitutionally burdensome on its face. Moreover, weighing the nature of the right involved and the burden imposed, the state is not limited in imposing this burden to the least restrictive methods of doing so.

This conclusion, however, is not the end of the analysis. *See The Patriot Party of Pa.,* 826 F.Supp. at 939 (noting that "the Supreme Court has on two separate

occasions invalidated facially valid ballot access laws because of their application to a political party."). In this regard, plaintiffs contend that the 2% level of support that minor political parties must have previously demonstrated to be labeled a political party pursuant to § 2831(a) is a sufficient "modicum of support" to fulfill any of the state's legitimate interests. *See Jenness,* 403 U.S. at 442, 91 S.Ct. 1970. In effect, plaintiffs are arguing that the combination of the 2% level of voter support requirement for minor party status in § 2831(a) plus the 2% signature requirement necessitated by § 2911(b) combine to form a constitutional violation. In making this argument, the plaintiffs rely heavily on a Maryland case, decided under Maryland law, that found that a similar "two-tier" arrangement violated the equal protection guarantees found in Article 24 of the Maryland Declaration of Rights. *See Maryland Green Party v. Maryland Bd. of Elections,* 377 Md. 127, 832 A.2d 214 (2003).[7] Despite *Maryland Green Party,* however, plaintiffs' argument fails.

Although plaintiffs point to the distinction in ballot access between the major political parties, which place their candidates on the ballot via a primary, and minor political parties, which have to use the nomination petition system, they do not seriously challenge this distinction, and

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[7] We, of course, are in no way bound by this interpretation of the Maryland state constitution. Moreover, the factual differences in *Maryland Green Party* are significant. In particular, the Green Party had qualified as a political party on August 16, 2000, by gathering 10,000 signatures, and then had to produce a petition, signed by 1% of total registered voters, to get its candidate on the ballot in Maryland for the November 2000 election. We distinguish *Maryland Green Party* from the present case because of the factual requirements of the Maryland statutes, requiring the gathering of two sets of signatures within a two month period.

under *Jenness,* alternate ballot access rules for major and minor political parties are not *per se* unconstitutional. 403 U.S. at 441-42, 91 S.Ct. 1970. ("[T]here are obvious differences in kind between the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization on the other. Georgia has not been guilty of invidious discrimination in recognizing these differences and providing different routes to the printed ballot."). *But see Anderson,* 460 U.S. at 793, 103 S.Ct. 1564 ("A burden that falls unequally on new or small political parties or on independent candidates impinges, by its very nature, on associational choices protected by the First Amendment.").

Moreover, the two-tiered nature of the minor political party process is consistent with, albeit different from, the two-tiered process for major political parties. Going back to the *Anderson* methodology, we conclude that the "two-tiered" nature of the law does not constitute an unacceptable burden.

Plaintiffs contend, however, that their showing of support to qualify as a political party is the sufficient "modicum of support" to be placed on the general election ballot. But in employing the "modicum" language in *Jenness,* the Supreme Court did not state that *any* showing of a modicum of support was sufficient to allay the state's legitimate concerns *vis-à-vis* ballot clutter. Rather, the Court stated that:

> There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot – the interest, if no other, in avoiding

> confusion, deception, and even frustration of the democratic process at the general election.

403 U.S. at 442. Here, the state's chosen "modicum of support" for political entities with less than 15% of the combined state-wide registration is the two percent signature threshold found in 2911(b).[8] The fact that a minor political party has earlier shown a modicum of support by meeting a separate goal, which entails a separate distinction, does not render the burden on plaintiffs an improper one. *See generally The Patriot Party of Pa.*, 826 F.Supp. at 935 (rejecting "the proposition that a political party should not have to re-establish a significant modicum of support in subsequent elections after it has met that burden once."). To hold otherwise risks infringing

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[8] Judge Smith would note that the plaintiffs did not argue that the state's definition of minor and major political parties by their voter registration, rather than by their prior electoral support, could potentially be used to distinguish this case from *Jenness*. *Cf. id.* at 433, 91 S.Ct. 1970 (noting that Georgia determined which political organizations were "political bodies" and not "political parties," and thus which nominating organizations were subject to the relevant signature requirement, on the basis of whether the organization's "candidate received 20% or more of the vote at the most recent gubernatorial or presidential election"). Rather, as the plaintiffs made clear during oral argument, they chose to rely instead on their argument that as applied to them, the signature requirement was unnecessary and therefore unreasonably burdensome.

Accordingly, we do not consider how the state's use of voter registration to define major and minor political parties might affect our scrutiny of the state's electoral laws, although we note that the Supreme Court in *Anderson* required that a state's ballot access restrictions be both reasonable and nondiscriminatory. *See* 460 U.S. at 788, 103 S.Ct. 1564; *see also id.* at 793, 103 S.Ct. 1564 ("Our ballot access cases . . . focus on the degree to which the challenged restrictions to exclude certain classes of candidates from the electoral process.") (quoting *Clements v. Fashing*, 457 U.S. 957, 964, 102 S.Ct. 2836, 73 L.Ed.2d 508 (1982)).

on an area traditionally allocated to the states. *See The Council of Alternative Political Parties,* 179 F.3d at 70 (noting that "states have broad power to enact election codes that comprehensively regulate the electoral process.").

Moreover, the fact that only New Mexico has a similar "two-tiered" system does not inflate the burden on the plaintiffs here, nor does it call into question the legitimacy of Pennsylvania's proffered interests. *See generally Perry,* 775 F.Supp. at 827 (arguing that "[i]t is not the courts' function to weigh the procedure chosen by the state legislature against the feasibility of less burdensome alternatives it could have chosen."). There are analogous obligations to demonstrate continuing voter support in the retention requirements found in other states. Our sister Circuits have upheld such retention requirements, which require a party to collect signatures to gain a place on the ballot and then invalidate a party's ballot-qualified status for the next election if the party's candidate does not receive a certain percentage of the vote, even though the party had shown an initial modicum of support. *See, e.g., McLaughlin v. North Carolina Bd. of Elections,* 65 F.3d 1215, 1221 (4th Cir.1995), *cert. denied,* 517 U.S. 1104, 116 S.Ct. 1320, 134 L.Ed.2d 472 (1996); *Rainbow Coalition v. Oklahoma State Election Bd.,* 844 F.2d 740, 741-42 (10th Cir.1988).

In addition, the lapse of time between reaching the 2% threshold in the previous election and having to obtain petition signers for the next election does not result in an unacceptably close measurement of the same indicia of support as was the case with the two-tier system in

Maryland.[9] A minor political party could have polled well in the previous election, based on a relatively well-known candidate, thus meeting the requirements of § 2831(a), but then run a slate of candidates who could not garner the necessary "modicum" of support in the upcoming election. Permitting the "modicum" to be perpetual may result in ballot clutter.

As such, the District Court did not err in holding that the minimal burdens on minor political parties was justified by Pennsylvania's interest in preventing ballot clutter and ensuring viable candidates. After weighing the rights affected, the interests involved, and the extent to which these interests require the rights to be burdened, *see Anderson,* 460 U.S. at 789, 103 S.Ct. 1564, we conclude that the plaintiffs have not demonstrated that the method chosen by the state to accomplish these interests violates the plaintiffs' rights to the equal protection of the laws.

D. Freedom of Association

Next, plaintiffs argue that under the reasoning of the Supreme Court in *California Democratic Party v. Jones,* 530 U.S. 567, 120 S.Ct. 2402, 147 L.Ed.2d 502 (2000), § 2911(b) violates their right to freedom of association and is thus unconstitutional. The Court in *Jones* struck down a California law that converted the state's primaries from closed to open. In the proposed, open primary, voters could

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[9] *See Maryland Green Party,* 832 A.2d at 219-20. Under the Maryland statutory scheme, the Green Party qualified as a political party on August 16, 2000, by submitting 10,000 signatures. The Green Party's candidate for the November 2000 election then had to produce a petition signed by at least 1% of the total number of registered voters in the contested congressional district.

select any candidate regardless of the voter's or the candidate's affiliation. Plaintiffs argue that they face a similar interference here because the 2% signature threshold requires minor political parties to obtain signatures from individuals who are not members of their respective parties. Republican and Democratic nominees, on the other hand, need not seek support from persons of other viewpoints to get on the Pennsylvania general election ballot.

Jones, however, is not applicable to a ballot access case, like the present one, in which internal party deliberations on the choice of party candidates are not implicated. Unlike the law at issue in *Jones,* Pennsylvania election law does not open the intra-party deliberations of minor political parties to persons who are unaffiliated with the party. "Forced" association caused by § 2911(b) occurs only as a minor party candidate solicits signatures from registered voters, who may be registered with any party or as an independent. However, in *Jenness*[10] and its progeny, the Supreme court recognized that the test for a modicum of support can be taken from registered voters in general in order to allow access to the general election ballot. But in regard to the issue presented in *Jones,* the intra-party procedures to select the party's candidates, there is no interference under the Pennsylvania system. In Pennsylvania, a minor political party is free to select anyone it chooses as its candidate, unaffected by the requirements of § 2911(b). As such, *Jones* is inapplicable.

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[10] Plaintiffs have questioned the wisdom of the Supreme Court's decision in *Jenness.* We note in passing that it is not the role of this Court to overturn Supreme Court precedent.

In addition, the Supreme Court's fusion law jurisprudence supports the distinction between intra-party deliberations and ballot access, with the former enjoying a higher degree of constitutional protection. For example, in *Timmons v. Twin Cities Area New Party,* 520 U.S. 351, 117 S.Ct. 1364, 137 L.Ed.2d 589 (1997), the Supreme Court upheld a Minnesota law that prevented a candidate from being nominated by more than one party, *i.e.* an anti-fusion law. In distinguishing the case from *Tashjian v. Republican Party of Connecticut,* 479 U.S. 208, 107 S.Ct. 544, 93 L.Ed.2d 514 (1986), overturning Connecticut's primary election statute which was in opposition to the rules of the Republican party, the Supreme Court noted that *Tashjian* "involved (the) regulation of political parties' internal affairs and core associational activities, Minnesota's fusion ban does not." *Timmons,* 520 U.S. at 359-60, 117 S.Ct. 1364. Here, Pennsylvania's 2% requirement regulates neither the minor political parties' internal affairs nor its core associational activities. Thus, we agree with the District Court's ultimate conclusion that associational rights are not violated by § 2911(b).

IV. Conclusion

For the reasons discussed above, we will affirm the District Court's denial of the plaintiffs' motion for a preliminary injunction. In addition, we will "affirm" the suggestion of the District Court that the Pennsylvania General Assembly "consider enactments that will simultaneously meet the identified state interests but also allow for a less ponderous means of ballot access for minor political parties in Pennsylvania."

ORDER

The petition for panel rehearing filed by appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and all judges who concurred in the decision having asked for rehearing, the petition for panel rehearing is **granted** so that the panel opinion can be amended. In light of the panel rehearing being granted, no action is taken on the petition for rehearing en banc filed on September 5, 2006. The Court's Opinion filed on August 23, 2006 is vacated and the amended opinion is being filed at this time.

APPENDIX II

426 F.Supp.2d 232

United States District Court, M.D. Pennsylvania.
Marakay J. ROGERS, et al., Plaintiffs
v.
Pedro A. CORTES, Secretary of the Commonwealth of Pennsylvania, Defendant.
No. 4:CV 06-0066.

April 5, 2006.

Samuel C. Stretton, The Law Office of Samuel C. Stretton, West Chester, PA, for Plaintiffs.

Howard G. Hopkirk, Gregory R. Neuhauser, Office of Attorney General-Litigation Section, Harrisburg, PA, for Defendant.

MEMORANDUM AND ORDER

JONES, District Judge.

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

Pending before the Court is Plaintiffs', Marakay Rogers, Esq., The Green Party of Pennsylvania, The Constitution Party of Pennsylvania, Ken V. Krawchuk, and Hagan Smith, Amended Motion for Preliminary Injunction ("the Motion"). (Rec.Doc. 19). A hearing was held on the merits of the Motion on February 2, 2006, and thereafter the parties submitted briefs and proposed findings of fact and conclusions of law. (Rec. Docs. 29, 34 and 35).

For the following reasons, the Motion (doc. 19) will be denied.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY:

This action for declaratory and injunctive relief brought pursuant to 42 U.S.C. § 1983 was initiated by the Plaintiffs Marakay Rogers ("Rogers"), the endorsed candidate of the Green Party for Governor of the Commonwealth of Pennsylvania in the November 2006 general election; the Green Party of Pennsylvania ("Green Party"); the Constitution Party of Pennsylvania ("Constitution Party"); Ken V. Krawchuk ("Krawchuk"), the endorsed candidate for the United States Senate for the Libertarian Party; and Hagan Smith ("Smith"), the endorsed candidate for Governor for the Constitution Party (collectively "the Plaintiffs").[1] The sole remaining defendant is Pedro A. Cortes ("Defendant"), the Secretary of the Commonwealth.[2]

The Plaintiffs challenge the constitutionality of Section 2911(b) of the Pennsylvania election code, *See* 25 Pa. Const. Stat. § 2911(b), as applied to minor political parties and their candidates. Section 2911(b) provides that a candidate of a minor political party for United States Senator, Governor of the Commonwealth, or other statewide office must obtain on nomination papers a number of signatures of registered voters that is "at least equal to two percentum of the largest entire vote cast for any

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[1] Krawchuk and Smith were added as party-plaintiffs pursuant to an agreement between the parties.

[2] The Attorney General and the Governor of Pennsylvania, as well as the Commonwealth of Pennsylvania itself were originally named as Defendants. However, by agreement of the parties, these Defendants were dismissed, since the Secretary of the Commonwealth is responsible for supervising elections in the Commonwealth of Pennsylvania and for enforcing the Pennsylvania Election Code.

elected candidate in the State at large" in the last election for statewide offices.

The Green Party and the Constitution Party are both "minor political parties," as defined by Sections 801(a) and 912.2(a) of the Election Code, *see* 25 Pa. Const. Stat. § 2831(a) and § 2872.2(a), for purposes of the 2006 general election. A political party is defined by Section 801(a) as:

> Any party or political body, one whose candidates at the general election next preceding the primary polled in each of at least ten counties of the State not less than [2%] of the largest entire vote cast in each of said counties for any elected candidate, and polled a total vote in the State equal to at least [2%] of the largest entire vote cast in the State for any elected candidate . . .

25 Pa. Const. Stat. § 2831(a). A "minor political party" is defined by Section 912.2(a) of the Election Code as:A political party as defined under section 801(a) or (b) [of the Election Code] whose State-wide registration is less than [15%] of the combined State-wide registration for all State-wide political parties as of the close of the registration period immediately preceding the most recent November election.

25 Pa. Const. Stat. § 2872.2. Both the Green and the Constitution Parties have qualified as minor political parties under the Pennsylvania Election Code for the 2006 election cycle.

The largest entire vote cast for an elected candidate in the last statewide election was 3,353,489 votes cast for Robert Casey, Jr., who was elected State Treasurer in the 2004 general election. As a result, the number of signatures that a minor political party candidate must obtain

on nomination papers in order to be placed on the ballot for the 2006 general election is two percent of Mr. Casey's vote total, which is 67,070. The 2006 general election signature requirement for minor political party candidates is decidedly larger than in past general election years because Mr. Casey received a record number of votes in the 2004 general election.

A minor political party candidate may circulate nomination papers from March 8, 2006 until August 1, 2006 for the November 2006 general election. Each signatory of a nomination paper for a minor political party candidate must be a qualified elector of the Commonwealth who has either registered to vote on or before the day he or she signs the nomination paper or signs a valid voter registration form before or on the same day he or she signs the nomination paper.[3] A signatory may or may not be a member of a political party and may sign nominating papers in support of only one minor political party candidate for each office for which there is a vacancy. However, an individual may sign a minor political party candidate's nomination paper even if he or she has signed a nomination petition in support of a Republican or Democratic candidate or has voted in the primary of either party. For a signature to be valid, the signer must write his or her legibly printed name and residence, including city, borough or township, in addition to his or her signature. The signer must also write the date, in either numbers or words. A signature will be deemed invalid if the other

[3] Therefore, it is entirely appropriate for an individual to sign a nomination form and a voter registration form at the same time, so long as the individual is a qualified elector and the registration form is postmarked on the same day as the signature on the nomination paper.

identifying information is written by an individual other than the signatory. Any omission of the necessary identifying information will also cause the signature to be deemed invalid and stricken. The use of "ditto" marks, nicknames or a printed signature will likewise cause a signature to be stricken. *See generally In re Nomination of Flaherty,* 564 Pa. 671, 770 A.2d 327 (2001); *see also In re Nomination Petition of Silcox,* 543 Pa. 647, 674 A.2d 224 (1996).

A minor political party may circulate nomination papers that include the names of all the party's endorsed candidates for all federal, state and local offices in the Commonwealth. Therefore, a minor political party is not required to obtain signatures separately for each office in order to place its endorsed candidates on the ballot, as candidates for the Republican and Democratic party are required to do.

Notably, major political party candidates must follow an entirely different process to be placed on the general election ballot. *See* Pa. Const. Stat. §§ 2831(a), 2861-2883. Presently, the Republican Party and the Democratic Party are the only major political parties in the Commonwealth. Of the 8,064,550 registered voters in Pennsylvania affiliated with a political party as defined by Section 801(a), over 7 million are registered and enrolled in either the Democratic Party or the Republican Party.

To be placed on the ballot for the general election, a major political party candidate for statewide office must first win a primary election. To even appear on the ballot for the primary election for example, a candidate for Governor of Pennsylvania must obtain, during a three-week collection period, the signatures of 2,000 registered voters who are formally enrolled only with that candidate's

political party. Thereafter, to be placed on the ballot for the general election, the candidate must poll a plurality of the vote in the primary election. Due to the size of the two major political parties, the candidates for statewide office must typically obtain well in excess of several hundred thousand votes to win the primary and thus be placed on the general election ballot. For example, in the last gubernatorial primary, the winners, current Governor Edward G. Rendell, a Democrat, and his Republican challenger Mike Fisher, polled 702,442 and 538,757 votes respectively.

The Plaintiffs allege that the signature requirement of Section 2911(b) is overly burdensome and effectively prevents them from being placed on the ballot for the 2006 general election in violation of their right of association under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment to the Constitution. The Plaintiffs argue that their First Amendment right to freedom of association is violated because the limited membership of the Green, Libertarian and Constitution Parties essentially requires them to obtain signatures from individuals who are not members of their individual parties. Plaintiffs further argue that because the ballot requirements faced by minor political parties are greater than those faced by members of the major political parties, their right to equal protection is violated.

The Plaintiffs move this Court to declare Section 2911(b), as applied to minor political parties, unconstitutional and to enjoin the operation and enforcement of Section 2911(b). The Plaintiffs also request that we enter an order allowing the Plaintiffs to participate in the general election if they obtain the same number of signatures as the Republican and Democratic parties. Alternatively, the

Plaintiffs request this Court to develop a system that would fairly provide a modicum of support for the minor political party candidates.[4] Finally, Plaintiffs seek attorneys fees and costs pursuant to 42 U.S.C. § 1988.

DISCUSSION:

Our first task in determining the constitutionality of Section 2911(b) is to determine the applicable level of scrutiny. By measuring the burden a statute imposes on a constitutional right we are pointed to the level of scrutiny that we should apply. "A court considering a challenge to a state election law must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendment that the Plaintiff seeks to vindicate' against 'the precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick v. Takushi,* 504 U.S. 428, 434, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992) (quoting *Anderson v. Celebrezze,* 460 U.S. 780, 789, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983)). Under this standard, if the burden imposed upon the right is severe, then the regulation must be "narrowly drawn to advance a state interest of compelling importance." *Burdick,* 504 U.S. at 434, 112 S.Ct. 2059 (quoting

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[4] Plaintiffs suggest that this Court order a minor political party to be defined based upon a statewide voters registration of five one-hundredths of one percent rather than upon the current two percent of a winner's total vote. Plaintiffs also submit that this Court should order that the minor party candidates are not required to meet any signature requirement because the minor political parties themselves have already demonstrated a modicum of support. (Rec. Doc. 13 at 5).

Norman v. Reed, 502 U.S. 279, 289, 112 S.Ct. 698, 116 L.Ed.2d 711 (1992)).

However, when the election law only imposes "reasonable, nondiscriminatory restrictions" upon the plaintiff's First and Fourteenth Amendment rights, "the State's regulatory interests are generally sufficient to justify the restrictions." *Burdick,* 504 U.S. at 434, 112 S.Ct. 2059 (quoting *Anderson,* 460 U.S. at 788, 103 S.Ct. 1564).

The Defendant submits that the appropriate standard of review to apply to Section 2911(b) is the rational basis test. The Defendant argues that in *Jenness v. Fortson,* 403 U.S. 431, 91 S.Ct. 1970, 29 L.Ed.2d 554 (1971), the United States Supreme Court created a five percent safe harbor when it upheld as constitutional a signature requirement of five percent of all eligible voters. Defendant notes that Pennsylvania requires minor political party candidates to obtain 67,070 signatures to be placed on the November 2006 general election ballot and that this amount is less than one percent of the total amount of registered voters in the Commonwealth. Since Pennsylvania's two percent requirement falls squarely underneath the *Jenness* five percent threshold, the Defendant argues that Section 2911(b) *ipso facto* does not constitute a substantial burden on the right to vote, and therefore need not be subjected to heightened scrutiny.

In *Jenness,* the Supreme Court upheld a Georgia statute that required candidates for elective public office who did not enter and win a political party's primary election to obtain signatures from an amount of individuals equaling five percent of *all* registered voters in the

prior election for the office in question.[5] The candidates had 180 days to circulate the petitions. Individuals could sign a petition even if they intended to vote in the major-party primary, and the signatories were not required to be members of the candidate's political party.

The Supreme Court upheld the five percent signature requirement by stating:

> There is surely an important state interest in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot – the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election.

Jenness, 403 U.S. at 441-442, 91 S.Ct. 1970. The Supreme Court reasoned that although the five percent figure was "apparently somewhat" higher than the "percentage of support required to be shown in many States as a condition for ballot position," the requirement was balanced by the lack of "arbitrary restrictions" upon the eligibility of potential signatories. *Id.* at 442, 91 S.Ct. 1970.

Defendant argues that although 67,070 signatures may seem to the Plaintiffs to be an extraordinarily large number to obtain, it clearly is not such a burdensome requirement when measured against the total number of registered voters in the Commonwealth. Defendant contends that

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[5] We pause to note that the Georgia statute obviously mandated that prospective candidates garner far more signatures than under the Pennsylvania statute we review today, which requires two percent of the largest entire vote cast for any elected candidate in the state at large.

although the signatures must meet particular standards or risk being stricken, Pennsylvania's requirements as to whom may sign a nomination paper, like Georgia's in *Jenness,* are fairly broad. That is, an individual who signs a petition for a major political candidate or voted in the Republican or Democratic primary is not precluded from signing a nomination paper for a minor political party candidate. Further, minor political party candidates may collect signatures for multiple offices on a single nomination paper, rather than each individual candidate collecting the required 67,070 signatures.

Defendant asserts that while it is true that obtaining the requisite amount of signatures might be difficult for Plaintiffs to accomplish, it is not impossible. At the hearing, testimony was presented by Krawchuck and James Clymer, Constitution Party candidate for U.S. Senator in 2004, that they had expended nearly $70,000 and $200,000 respectively obtaining signatures on nomination papers for the 2004 general election. However, as Defendant accurately submits, the fact that an individual or a political party lacks sufficient resources to successfully run for public office does not constitute a violation of the rights of the candidate or the political party under the First Amendment.[6]

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[6] We do note, as will be stated in our conclusion, that a finding of constitutionality does not necessarily imply our endorsement of the logic of Section 2911(b). While the fact that candidates from minor parties must potentially expend large sums to solicit signatures is insufficient to render the law unconstitutional, we share Plaintiffs' concerns about the need for prospective candidates to expend ever-increasing amounts of money and how that colors the political process.

Plaintiffs counter that Section 2911(b) imposes a severe burden on minor political party candidates' access to the ballot, and therefore the statute must be subjected to strict scrutiny. Plaintiffs submit that both the Green Party and the Constitution Party have already proven a "modicum of political support" in the electorate because they have already qualified as minor political parties under the Pennsylvania Election Code. Further, Plaintiffs argue that these minor political party candidates have already received the endorsement of their respective parties by route of the internal procedures governing each.

Plaintiffs argue that requiring candidates of minor political parties to obtain the requisite number of signatures on nomination papers to be placed on the ballot is overly burdensome and serves no compelling government interest. Although Plaintiffs concede that avoiding ballot clutter is a legitimate state need, they argue that the Commonwealth has not experienced cluttered ballots over the years. Moreover, Plaintiffs assert that the signature requirement for minor political party candidates is inappropriate in light of the fact that by this stage of the process it can be assumed that the minor political party has already established a 'modicum of support' by qualifying for minor political party status under the Pennsylvania Election Code.

Plaintiffs also submit that Section 2911(b) violates their First Amendment right to freedom of association. Presently in the Commonwealth, the Green Party has 16,323 enrolled members, the Libertarian Party 34,100 members and the Constitution Party 3,008 enrolled members. Plaintiffs argue that Section 2911(b) necessarily requires qualified minor political party candidates to garner the support of persons outside of their party in

order to be placed on the general election ballot, since obviously none of the minor parties at present has a membership as great as 67,070 individuals. Thus, Plaintiffs submit that members of qualified minor political parties, with their own internal nomination procedures, are forced to associate with non-members in violation of their First Amendment right to freedom of association, and that Section 2911(b), in effect, forces association in order to get on the ballot.

Plaintiffs rely on the Supreme Court's decision in *California Democratic Party v. Jones,* 530 U.S. 567, 120 S.Ct. 2402, 147 L.Ed.2d 502 (2000) to support their freedom of association argument under the First Amendment. In *Jones,* the Supreme Court held that a state could not require a political party to hold an open primary in which non-party members were allowed to vote. The Supreme Court reasoned that open primaries allow non-party members to usurp the party's ability to chose its own candidates for elective public office, in violation of that party's First Amendment freedom of association.

The Defendant responds to Plaintiffs' contention that *Jones* should guide us by stating that Plaintiffs' reliance on *Jones* is misplaced, and that it is clearly distinguishable from the instant case. The Defendant submits that minor political parties in Pennsylvania conduct closed conventions at which the party's candidate for each office is selected, and as a result individuals outside the party have no bearing on the candidate-selection process. Rather, Defendant argues that minor political party candidates must rely on individuals outside their party only to sign nomination papers, to show that these candidates have sufficient support in the general electorate to be viable candidates and warrant being placed on the

general election ballot. Defendant argues that Section 2911(b) is not a violation of the Supreme Court's mandate in *Jones,* because it does not interfere with the minor political party's internal candidate selection process, but rather Section 2911(b) serves the important state interest of preventing non-viable candidates from being placed on the ballot.

We will note that the most appropriate way to arrive at the standard of review in ballot access cases was perhaps most cogently announced by the Supreme Court in *Anderson.* There, the Supreme Court developed an analytical framework under which the reviewing court:

> must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It must then identify and evaluate the precise interests put forward by the state as justifications for the burden imposed by the rule. In passing judgment, the court must not only determine the legitimacy and strength of each of those interests; it must also consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all of these factors is the reviewing court in a position to decide whether the challenged provision is constitutional.

Anderson, 460 U.S. at 789, 103 S.Ct. 1564.

After a close review of the submissions of the parties and the testimony given at the hearing, it is our opinion that Section 2911(b) does not impose a severe burden upon the Plaintiffs' constitutional rights, and accordingly, we will apply the rational basis test to the statute to determine its constitutionality.

We will first note that in light of the aforecited *Jenness* five percent safe harbor, we hold that the signature requirement imposed by Section 2911(b) cannot be considered a substantial burden upon minor parties. As previously referenced, Section 2911(b) requires minor political party candidates to obtain signatures amounting to two percent of the largest entire vote cast for any elected candidate in the state at large in the last election for statewide offices. We reiterate that this percentage is substantially smaller than the percentage upheld by the Supreme Court in *Jenness*. Moreover and as noted, Section 2911(b) applies this smaller percentage to an aggregate number that is necessarily lower than *all* of the registered voters in the prior election, which was the requirement reviewed in *Jenness*. Despite the Plaintiffs' assertions to the contrary, *Jenness* remains precedential upon this Court unless and until it is altered by the Supreme Court itself. Notably, the Supreme Court has not altered the essential holding of *Jenness* in the course of the over three decades that have elapsed since it was decided.

While the holding in *Jenness* necessarily implies that Section 2911(b) is not overly burdensome, we further believe that the operation of this statute within the context of the Pennsylvania Election Code and the current state of the Pennsylvania electorate indicates that it does not place a substantial burden upon any protected constitutional right. Although it is clear that the requisite signatures must meet certain standards or risk being stricken, we note again that the Plaintiffs are free to collect signatures from the entire population of registered voters, regardless of party affiliation. Plaintiffs may obtain signatures from an elector enrolled in the Democratic or Republican Party, even if that elector has signed a nominating

petition for a candidate of his own party or intends to vote in his or her major-party primary. And while it is true that an elector may only sign one minor party nomination paper, presently there are only three qualified minor political parties in the Commonwealth, thereby leaving each party with a pool of millions of electors from whom to seek signatures.

Accordingly and as noted, because we find that Section 2911(b) does not impose a substantial burden on a fundamental right, we hold that the appropriate level of scrutiny to apply to the statute is the rational basis test. With that task accomplished, we turn to an elucidation of the precise regulatory interests cited by the Commonwealth in order to determine if these identified interests are sufficient to justify the restrictions Section 2911(b) imposes upon the Plaintiffs.

Defendants submit that there are two regulatory interests advanced by Section 2911(b). They are first, that the statute operates to limit or effectively extinguish ballot clutter from the Commonwealth's general election ballot and second, that Section 2911(b) functions to insure that minor political party candidates have sufficient support with the general electorate to be considered viable candidates and warrant being placed on the ballot. We shall discuss each of the Commonwealth's purported legitimate regulatory interests in turn.

The Supreme Court has recognized that elimination of ballot clutter is a legitimate state interest: "A State has a legitimate interest in regulating the number of candidates on the ballot." *Bullock v. Carter,* 405 U.S. 134, 145, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972) (citing *Jenness,* 403 U.S. at 442, 91 S.Ct. 1970; *Williams v. Rhodes,* 393 U.S. 23, 32, 89

S.Ct. 5, 21 L.Ed.2d 24 (1968)). Subsumed within the interest of reducing ballot clutter are various other legitimate state interests, including prevention of clogging election machinery, avoidance of voter confusion, and assurance that the winner is the choice of the majority. *See Bullock,* 405 U.S. at 145, 92 S.Ct. 849. Plaintiffs argue that the Defendant does not have a legitimate interest in reducing ballot clutter because Pennsylvania is not plagued by overcrowded ballots. However, Plaintiffs' argument widely misses the mark on this point. The fact that Pennsylvania does not suffer from clutter ballots is clearly indicative of the fact that Section 2911(b) is indeed advancing the legitimate state regulatory interests that the Defendant asserts. Put another way, Section 2911(b) by its operation prevents the evident clutter and confusion that undoubtedly would be caused by having a plethora of non-viable candidates appear on the general election ballot.

Second, the Defendant asserts that Section 2911(b) advances the legitimate state regulatory interest of ensuring that minor political party candidates are viable candidates with the general electorate and have generated sufficient support to warrant being placed on the ballot. As we have previously noted, the current enrollment of the three presently qualified minor political parties is quite small when compared with the total number of registered voters in the Commonwealth. Therefore, although a minor political party itself endorses an individual to be its candidate for statewide office, that is clearly no guarantee that the candidate will garner support with the general electorate. By requiring these chosen candidates to show a further modicum of support with the electorate before obtaining a position on the ballot, Pennsylvania prevents

non-viable candidates from being placed on the general election ballot. With their present enrollment numbers, even assuming uniform support for a minor party candidate, the votes of all the members of a minor political party could never be enough to elect its candidate to a statewide office. Therefore, it is wholly legitimate for the Commonwealth to require minor political party candidates to show an additional level of political support with the electorate above and beyond the modicum of support already shown to qualify the party itself, since, to reiterate, such candidates could not be elected without the electoral support of those who do not share their party affiliation.

Therefore, it is our opinion that the Commonwealth's proffered regulatory interests are legitimate and sufficient to justify the restrictions imposed upon the Plaintiffs by Section 2911(b). Moreover, although the requirements of Section 2911(b) may be difficult for some minor political party candidates to meet, the section is not overly burdensome and does not act as a functional bar to ballot position for these candidates.

Coextensive with the Plaintiffs' First Amendment argument, Plaintiffs argue that Section 2911(b) violates the Equal Protection Clause of the Fourteenth Amendment because candidates of minor political parties are treated differently than major political party candidates. We will next turn to an examination and disposition of this issue.

It is well established that there are legitimate reasons for states to treat minor and major party candidates differently from one another. As the Supreme Court stated in *Jenness:*

> The fact is that there are obvious differences in kind between the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization on the other. Georgia has not been guilty of invidious discrimination in recognizing these differences and providing different routes to the printed ballot. Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike . . .

Id. at 441-442, 91 S.Ct. 1970. The Supreme Court also noted in *Jenness* that Georgia did not violate the Equal Protection Clause of the Fourteenth Amendment by creating two alternate paths to the ballot for minor and major political parties, in light of the fact that neither path could be assumed to be inherently more burdensome than the other. *See id.* at 440, 91 S.Ct. 1970.

The Plaintiffs argue that major party candidates need only 1,000 to 2,000 signatures to be placed on the primary ballot. While this assertion is true, we again note that once major party candidates make it to the primary ballot, they must then poll a plurality of votes, in the hundreds of thousands, in order to be placed on the general election ballot. In essence then, it could be argued that major political party candidates are required to show a *greater* amount of support than minor political candidates in order to appear on the general election ballot. Time and again courts have been presented with the argument that analogizes the 1,000 to 2,000 signature *primary ballot* requirement for major parties to the two percent (here 67,070) signature *general election* requirement for minor parties. This is an unavailing attempt to in effect compare an apple to an orange, as these requirements are distinctly

different things involving different electoral events. A primary election is not a general election, and to endeavor to measure ballot access requirements for one against the other grossly confuses the issue. Therefore, the Plaintiffs' argument that general election ballot access requirements for minor political party candidates are more onerous than for major party candidates to a degree that renders Section 2911(b) in violation of the Equal Protection Clause of the Fourteenth Amendment is without merit.

CONCLUSION:

Having rendered the above analysis and conclusions, we will take this opportunity to observe that as submitted by Plaintiffs, there is very likely a better way for the Commonwealth to provide access to the general election ballot for minor party candidates. Section 2911(b) is somewhat cumbersome in its operation, and we are not at all sure that at the time of its enactment a future signature requirement as high as 67,070 was envisioned. However, that the General Assembly could have done better, or that minor party candidates face a somewhat daunting task to get on the general election ballot in 2006 are insufficient reasons to overcome the existing jurisprudence that clearly guides us to find Section 2911(b) constitutional. This Court is not unsympathetic to the minor parties' dilemma, and their case was nobly and well argued by Plaintiffs' counsel. We are not however a superlegislature, but rather a court of law, and thus we decline to supplant our wisdom in place of that of the Commonwealth's elected officials. That said, we strongly urge the General Assembly to consider enactments that will simultaneously meet the identified state interests but also allow

for a less ponderous means of ballot access for minor political parties in Pennsylvania.

We will also note that we share the Commonwealth's concern, as evidenced within Section 2911(b), that without a law that compels minor party candidates to demonstrate a modicum of support in order to qualify for the general election ballot, there may arise ballot clutter sufficient to confuse voters. Undoubtedly, and in particular during these contentious times in Pennsylvania politics, some will brand this concern as undemocratic in that it places little faith in the ability of voters to sort out a potentially long general election ballot. While this degree of confidence in the electorate is laudable, we believe that establishing a reasonable level of support for statewide candidates, rather than allowing for a *de facto* open ballot, is clearly the better practice.

Striking a balance between these competing interests will always be problematic. While Section 2911(b) is an imperfect rendering, it is also in our view a constitutional one. As a result, we decline to afford Plaintiffs the extraordinary relief they request.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. Plaintiffs' Amended Motion for Preliminary Injunction (doc. 19) is DENIED.

APPENDIX III

UNITED STATES COURT OF APPEAL
FOR THE THIRD CIRCUIT

Nos. 06-2241

MARKAY J. ROGERS, ESQUIRE, THE GREEN PARTY OF PENNSYLVANIA, THE CONSTITUTION PART OF PENNSYLVANIA, KEN V. KRAWCHUK and HAGAN SMITH

Appellants

v.

PEDRO A. CORTES, SECRETARY OF THE COMMONWEALTH OF PENNSYLVANIA

Before: SCIRICA, *Chief Judge*, SLOVITER, ROTH*, McKEE, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, ALDISERT**, *Circuit Judges*

ORDER

The petition for rehearing *en banc* filed by the Appellants in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the

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* Judge Roth assumed senior status on May 31, 2006. Her vote is limited to panel rehearing only.

** Senior Judge Aldisert's vote is limited to panel rehearing only.

decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is **denied**.

By the Court,

/s/ JANE R. ROTH
Circuit Judge

Dated: April 5, 2007

CH/cc: Samuel C. Stretton, Esq.
Howard G. Hopkirk, Esq.